United States Steel Corporation *and* Roberta Wood *and* Marcella Kitching. Cases 13-CA-19419 and 13-CA-19420

May 7, 1981

DECISION AND ORDER

On August 8, 1980, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by photographing its employees while they were engaged in protected concerted activities. He further concluded, however, that no remedial order was warranted based on his finding that the impact of Respondent's conduct on the employees' Section 7 rights was slight. Accordingly, he recommended that the complaint be dismissed. For the reasons set forth below, we agree with the conclusion that Respondent violated the Act as alleged but, contrary to the Administrative Law Judge, we find that issuance of a remedial order is fully warranted.

The record establishes that on November 14, 1979, in support of grievances filed by Respondent's female employees concerning the adequacy of locker room facilities provided for their use, the Women's Committee of the Union held a demonstration at one of the entrances to Respondent's plant. It is undisputed that the demonstration involved neither violence nor other illegal activities by the employees. It is further undisputed that Respondent took no disciplinary action against the employees involved and took no legal action as a result of the demonstration. However, consistent with its practice in connection with 13 prior demonstrations (none of which is alleged to have involved unlawful activities), Respondent monitored the demonstration by assigning two photographers to cover the event. The two photographers were told to take pictures of the demonstration but were not given any guidelines or limitations. Approximately 140 pictures were taken of the demonstration and its preparations. Those pictures included closeup shots of individual employees as they demonstrated.

In adopting the Administrative's Law Judge's conclusion that Respondent's conduct violated Section 8(a)(1) of the Act, we note that it is well established that, absent legitimate justification, an employer's photographing of its employees while they are engaged in protected concerted activity constitutes unlawful surveillance. See, e.g., *Glomac Plastics, Inc.*, 234 NLRB 1309, 1320 (1978); *Larand Leisurelies, Inc.*, 213 NLRB 197, 207 (1974); *Flambeau Plastics Corporation*, 167 NLRB 735, 743 (1967). We further find that Respondent has failed to establish any legitimate justification for its actions. In this regard, Respondent's superintendent, Studohar, who directed that arrangements be made for photographing the demonstration, testified that he did so for the purpose of securing evidence for possible litigation. However, he also admitted that he had no reason to anticipate that the participants in the demonstration would engage in violent or other illegal conduct.[1] Furthermore, as noted above, the employees in fact did not engage in such conduct and Respondent did not institute any legal action as a result of the demonstration. In similar circumstances, the Board consistently has rejected the defense raised by Respondent here. Thus, it is well settled that "purely 'anticipatory' photographing of peaceful picketing in the event something 'might' happen does not justify [an employer's] conduct when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity." *Glomac Plastics, Inc., supra.*[2] We, therefore, find Respondent's conduct violative of Section 8(a)(1).

As noted above, the Administrative Law Judge concluded that no remedial order was warranted because the impact, if any, of Respondent's conduct on the employees' Section 7 rights was slight. In this regard, he found that Respondent's unlawful conduct was isolated and occurred in the context of a long bargaining history between Respondent and the Union with no evidence of union animus on Respondent's part. The Administrative Law Judge also observed that Respondent's conduct focused upon employees who apparently welcomed personal exposure since they did not object when their activities were recorded by "neutral" sources. In so doing, the Administrative Law Judge empha-

[1] The Administrative Law Judge found that the only possible "impropriety" in connection with the demonstration related to the fact that employees seeking to enter and leave the plant may have been momentarily obstructed or diverted from passing through the gate. He further found that such inconvenience was viewed by Respondent as isolated and as failing to detract materially from the overall orderliness of the demonstration.

We disavow the Administrative Law Judge's statement that a degree of privilege would arguably attach to the use of photography to assure that certain employees were not neglecting their work responsibilities in order to participate in the rally. In any event, we note, as did the Administrative Law Judge, that this factor was not asserted by Respondent as a defense for its conduct.

[2] See also *Larand Leisurelies, supra; Holly Farms Poultry Industries, Inc.*, 186 NLRB 210, 213 (1970).

sized that the Women's Committee made efforts to publicize the demonstration through the local media and that the front page of one of the Union's publications carried four photographs which identified several of the demonstrators.

At the outset, contrary to the Administrative Law Judge, we do not find Respondent's conduct to be isolated. Thus, Respondent's supervisor of security conceded at the hearing that the photographing and monitoring of employee demonstrations is Respondent's corporate policy. In this regard, he also testified that he could recall personally monitoring 13 demonstrations in the 8-year period preceding the instant demonstration when photographs were taken and written reports of the events were submitted to Respondent.[3] He further admitted that Respondent maintains these photographs and reports in the ordinary course of its business. Further, it is clear that Respondent's photographing of the demonstration here was quite extensive. Thus, as noted above, Respondent's photographers took approximately 140 pictures, including closeup pictures of individual employees as they demonstrated. In these circumstances, Respondent's conduct cannot reasonably be viewed as "isolated."

Nor does the fact that Respondent and the Union enjoyed a long bargaining history or the absence of animus by Respondent justify a conclusion that no remedy is warranted. Thus, the critical inquiry here is not the impact of Respondent's action on its relationship with the Union, but rather whether Respondent's conduct in photographing employees reasonably tended to interfere with employee rights under Section 7 of the Act.

Finally, unlike the Administrative Law Judge, we attach little weight to the fact that the Women's Committee publicized the demonstration. Such efforts by the committee were certainly not an invitation to Respondent to make a pictorial record of the demonstration and of those who participated in it. Indeed, as recognized by the Administrative Law Judge, the fact that an employer has inherent control over discipline renders the impact of its recording of employee demonstrations significantly different from such recording by the media, and, as he found, the employees in seeking to attract the attention of the public did not waive their right to the protection of the Act.

Accordingly, we conclude that Respondent's conduct tended to interfere with, restrain, and coerce employees in the exercise of the rights guaranteed them by Section 7 and that such conduct fully warrants issuance of a remedial order.[4]

[3] Respondent did not contend that any of these previous demonstrations were attended by violence or other illegal conduct.

CONCLUSIONS OF LAW

1. The Respondent, United States Steel Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steel Workers of America, Local 65, is a labor organization within the meaning of Section 2(5) of the Act.

3. By photographing employees while engaged in activity protected by Section 7 of the Act on November 14, 1979, Respondent has engaged in unlawful surveillance and thus has committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, we shall order it to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. We shall also order Respondent to destroy all photographic evidence it obtained by its unlawful surveillance.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United States Steel Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in unlawful surveillance of employees' protected concerted activities by photographing such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Destroy all photographs and copies thereof (including both negatives and positives) taken by or on behalf of Respondent of the demonstration

[4] We further disagree with the Administrative Law Judge that the issuance of a remedial order here would condone the employees' bypassing of their exclusive representative and their contractual remedies. Thus, it is clear that the employee demonstration here was fully consistent with and in support of the grievance over the adequacy of locker room facilities which had been filed by the Union through the grievance procedure. See *Dreis & Krump Manufacturing, Inc.*, 221 NLRB 309, 316 (1975). Further, employees have a statutory right to seek redress for unfair labor practices before the Board.

which occurred at Respondent's plant on November 14, 1979, including the participants therein and the preparations therefor.

(b) Post at its South Works facility, Chicago, Illinois, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT, by photographing or otherwise, engage in surveillance of peaceful demonstrations or other protected concerted activities of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL destroy all photographs and copies thereof (including both negatives and positives) that we took of the demonstration at our plant on November 14, 1979.

UNITED STATES STEEL CORPORATION

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me in Chicago, Illinois, on June 20, 1980, upon original unfair labor practice charges filed on December 26, 1979, and a complaint issued on January 22, 1980. In its duly filed answer, United States Steel Corporation[1] denied that any unfair labor practices were committed. After close of the hearing, briefs were filed on behalf of the General Counsel and Respondent.

Upon the entire record in this proceeding,[2] including consideration of the post-hearing briefs, it is hereby found as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation, with a facility in Chicago, Illinois, herein called the South Works, from which it is engaged in the manufacture of steel and related products. During the calendar year preceding issuance of the complaint, a representative period, Respondent in the course and conduct of said operations purchased and received at its South Works facility materials and supplies valued in excess of $50,000 directly from points located outside the State of Illinois.

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the United Steel Workers of America, Local 65, herein called the Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

This case is predicated on a single independent 8(a)(1) allegation arising from conduct limited to that which the complaint describes as follows:

> On or about November 14, 1979, the Respondent photographed its employees as said employees engaged in protected concerted activity thereby creating the appearance of coercive surveillance for purposes of future reprisals.

The facts pertaining to the aforesaid allegation are virtually undisputed. Thus, in 1979, or perhaps earlier, female employees at South Works manifested their concern for the adequacy of locker room facilities made available for their use. In consequence, grievances were filed, which as of November 1979[3] had been heard at the third step of the established contractual dispute settlement procedures. In support of the grievances, on November 14, a demonstration was held under sponsorship of the Woman's Committee of the Union at the 89th Street entrance to the plant. Consistent with its practice in connection with 13 prior demonstrations, Respondent monitored the rally assigning 2 photographers to cover the event.

Some 50 to 75 employees participated in the demonstration which took place from 2 to 4 p.m. From all appearances on the record, the participants therein, many

[1] Name of Respondent was amended at the hearing.

[2] Certain errors in the transcript are hereby noted and corrected.

[3] All dates refer to 1979 unless otherwise indicated.

of whom carried picket signs, were good humored and peaceable,[4] and the rally proceeded from start to finish with neither violence nor other illegal activities. In its wake no employee was disciplined and no legal action was taken by Respondent in consequence thereof.[5]

As for the alleged unlawful conduct, cameras were used by agents of Respondent at the rally on an unguarded basis. Photographers were merely deployed and told to take pictures without guideline or any form of limitation. The photographic record was not limited to the ongoing demonstration but reached preliminary preparations as well. Some 140 shots were taken, including closeup photographs of individual employees. As for those made a part of this record, none appear possessed of value in connection with vindication of any management interest.

Nonetheless, serious question exists as to whether any violation which inured was of too isolated a nature to justify intervention by the National Labor Relations Board. Under the precedent the fact that management representatives observed employees while engaged in the protected activity involved here was inoffensive to the Act.[6] And taking account of the potential for illicit behavior inherent in any picket line, the mere possession of cameras or other recording equipment by supervisors without more would not give rise to an actionable unfair labor practice. The 8(a)(1) allegation involved here rests narrowly upon the fact that such equipment was used under circumstances where the protected activity was waged peaceably and under circumstances where violence and other forms of unprotected employee action were not shown through collateral, objective evidence to have been within reasonable anticipation. Board policy proceeds in such circumstances upon an assumption that "the Employer is recording for some present or future course of action. . . ." *Tennessee Packers, Inc.*, 124 NLRB 1117, 1123 (1959). In other words, such conduct on the part of employers carries "a coercive implication that Respondent was recording . . . for the purpose of visiting future reprisals." *Larand Leisurelies, Inc.*, 213 NLRB 197, 207 (1974). Thus, in the final analysis, an inference that Respondent's conduct tended to create such an impression among employees is vital to successful maintenance of the instant complaint.

In this connection, there are several factors which negate the assumption that employees herein were gripped by any deep concern that they might be identified by management as participants in the rally. Apart from its location and timing, the Women's Committee of the Union, in advance of the demonstration, through a publicity committee made efforts to publicize the event through the local media. On November 5, an article appeared on the front of the Daily Calumet, a local newspaper,[7] announcing the demonstrations. By invitation of the Women's Committee, representatives of that newspaper, as well as the Chicago Tribune, were on the scene at the rally, photographing the demonstration and its participants. In addition, pursuant to the publicity committee's request, a television news team from channel 7, a major television station in the Chicago market area, filmed segments of the rally.[8] Finally, after the rally, in the month of December, the Union's publication carried on its front page four photographs in which several of the demonstrators were readily identifiable. Quite clearly the thirst on the part of employees for publicity as manifested by the foregoing is not to be equated under the Act with the use of recording equipment by their employer. In this respect I agree with the General Counsel that the inherent control over discipline held by employers gives rise to a crucial distinction. However, it is clear on this record that the sponsors of the rally did not shun notoriety in attempting to make their point. While the employee participants did not thereby waive their right to statutory protection, their effort in that regard is objectively indicative of their own view as to the possibility of employer reprisal.[9]

Of further bearing upon the critical question of whether the photography would reasonably be viewed as "for the purpose of visiting future reprisals"[10] is the absence of collateral evidence of animus. The complaint is devoid of allegations that Respondent engaged in any other misconduct,[11] and neither this record nor any other case cited by the General Counsel demonstrates a propensity on the part of South Works management to effect coercive action against employees on pretextual grounds or to otherwise discriminate in violation of the Act. Further the rally was not in conjunction with issues possessed of the potential for hard feeling found in disputes arising from initial organization[12] or contract negotiation.[13] Indeed, the entire issue arises against a background showing that employees have been afforded the protection of a bargaining representative entrenched at South

[4] The only suggestion of possible impropriety in connection with the picketing related to the fact that employees seeking to enter and leave the plant may have been momentarily obstructed or diverted from passing through the gate. Such inconvenience was viewed as isolated and as failing to derogate materially from the overall orderliness of the demonstration.

[5] See, e.g. *Burton Kirshner, Inc.*, 209 NLRB 1081 (1974); *Franklin Stores Corporation, and its Wholly Owned Subsidiaries, Barkers of Willimantic, Inc., and Barkers of Wallingford, Inc., and the Miles Shoes Meldisco Willimantic, Inc.*, 199 NLRB 52, 64-65 (1972).

[6] "[U]nion representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." *Milco, Inc., T.O.D. Manufacturing Co., Inc. and Allan Marine Division of Jervis Corp.*, 159 NLRB 812, 814 (1966). See, e.g., *Porta Systems Corporation*, 238 NLRB 192 (1978).

[7] See Resp. Exh. 12.

[8] The parties stipulated that, at 5 p.m. on November 14, Channel 7 broadcast a 1-minute, 2-second clip of the picketing to the Chicago television market area.

[9] A witness for the General Counsel, Marcella Kitching, one of the coordinators of the rally, testified that one of the photographers on two occasions singled her out and that she "was pretty scared as to reasons why he was taking the pictures of me rather than the group." Kitching did not impress me as a reliable witness and her testimony in this respect does not give credence.

[10] See, e.g., *Larand Leisurelies, Inc., supra.*

[11] Cf. *Puritania Manufacturing Corporation*, 159 NLRB 518, 519, fn. 2 (1966).

[12] *Sackett's Welding*, 207 NLRB 1030 (1973); *Larand Leisurelies, Inc., supra; Colonial Haven Nursing Home, Inc.*, 218 NLRB 1007 (1975); *Russell Sportswear Corporation*, 197 NLRB 1116 (1972); *Farah Manufacturing Company, Inc.*, 204 NLRB 1173 (1973).

[13] Cf. *Gopher Aviation, Inc.*, 160 NLRB 1698, 1717 (1966); *The Udylite Corporation*, 183 NLRB 163 (1970); *Flambeau Plastics Corporation*, 167 NLRB 735, 743 (1967); *R. D. Goss Inc.*, 203 NLRB 1173 (1973); *Glomac Plastics, Inc.*, 234 NLRB 1309, 1316 (1978).

Works since 1942 in what appears to have been an amicable relationship with management. Employees at that plant have benefited through negotiation of 18 separate collective-bargaining agreements, including local supplements, all of which were effected without authorized work stoppages at the local level. Accordingly the participants in the rally ought not to be confused with those who are unsophisticated, unprotected, and whose economic dependence renders them highly vulnerable to unilateral acts by antiunion employers seeking to avoid at any cost intrusion upon their prerogatives by a third party.[14]

In sum, I have no doubt that Respondent engaged in the photography on an anticipatory, evidence gathering basis, and that its defense to that action was technically deficient.[15] Nonetheless, the violation was isolated, occurred in a context of a long bargaining history, involved an employer which long ago had accepted principles of industrial democracy and finally focused on employees who welcomed personal exposure of their activity through recordation from other sources. Realistically viewed, the degree of impact of Respondent's conduct, if any, with respect to Section 7 rights was slight. In my opinion, Board intervention with respect to an established bargaining relationship on such a slender and isolated basis could produce precedent which, on balance, might well in the long run prove damaging to more compelling statutory policies. For to condone an employee bypass of the exclusive representative and contractual remedies in the circumstances presented herein necessarily entails disproportionate expenditure of private and public resources all in quest of a remedy, the justification for which is thinly based and the utility of which in the future is debatable. These circumstances—together with the likelihood that the burden of defending this action alone will suffice to afford Respondent impetus to revise its internal policy so as to conform with the precedent in this area—convince me that no remedial order is warranted herein.[16]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by photographing employees while engaged in activity protected by Section 7 of the Act.

[Recommended Order for dismissal omitted from publication.]

[14] Cf. *Tennessee Packers, Inc.*, 124 NLRB 1117, 1123 (1959); *Fluid Chemical Company, Inc.*, 203 NLRB 244 (1973); *The May Department Stores Company*, 184 NLRB 878 (1970).

[15] The South Works plant was in operation on a three-shift, round-the-clock basis. The governing collective-bargaining agreement, as pointed up by Respondent's evidence, contains a "no-strike clause" as well as provisions authorizing discipline for absenteeism unsupported by "just cause." Since the rally was conducted during working time, a degree of privilege would arguably attach to the use of photography to assure that certain employees were not neglecting their work responsibilities in order to participate in the rally. Although this factor contributes to the mitigating circumstances enveloping the conduct under interdict by the complaint, it was not asserted by Respondent specifically as the reason behind its action, and accordingly does not rise to the level of an overarching defense.

[16] *Summit Nursing and Convalescent Home, Inc.*, 204 NLRB 70, fn. 1 (1973).